Supreme Court, U.S.
FILED
FEB 10 1998
CLERK

No. 97-1071

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CHARLES D. MARSHALL, Warden; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

ROBERT S. TURNER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
*DONALD E. DeNICOLA
Deputy Attorney General
DAVID F. GLASSMAN
Deputy Attorney General
Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2355
Counsel for Petitioners
* *Counsel of record*

TABLE OF CONTENTS

	Page
ARGUMENT	1
THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS VIOLATED TEAGUE v. LANE, 489 U.S. 288 (1989) AND CREATED A CONFLICT AMONG CIRCUITS BY REQUIRING A "COMPARATIVE ANALYSIS" OF JURORS WHEN REVIEWING A CLAIM UNDER BATSON v. KENTUCKY, 476 U.S. 79 (1986)	1
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
Cases	
Batson v. Kentucky, 479 U.S. 79 (1986)	2-4
Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed. 385 (1991)	4
Teague v. Lane, 489 U.S. 288 (1989)	4, 5
Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995)	1
Turner v. Marshall, 121 F.3d 1248 (9th Cir. 1997)	2
United States v. McMillon, 14 F. 3d 948 (4th Cir. 1994)	4

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ARGUMENT

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS VIOLATED TEAGUE v. LANE, 489 U.S. 288 (1989) AND CREATED A CONFLICT AMONG CIRCUITS BY REQUIRING A "COMPARATIVE ANALYSIS" OF JURORS WHEN REVIEWING A CLAIM UNDER BATSON v. KENTUCKY, 476 U.S. 79 (1986)

In opposing a grant of certiorari, the respondent prisoner begins by stating the familiar rule that certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Opp. 6. Indeed, for that reason the state did not seek review from this Court of the Ninth Circuit's original holding that a prima facie case of racial discrimination had been established. *Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995)(*Turner I*).

It was only after the Ninth Circuit took the additional step of becoming the first federal appellate court to invoke a new rule of comparative juror analysis

on habeas review to upset the finality of a state court judgment that the state asked this court to review the case. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997) (*Turner II*).

Respondent also tries to discourage the Court from review by minimizing the case as merely involving an issue of sufficiency of the evidence. Likewise, he complains that a grant of certiorari would only operate to settle a disputed factual issue. P. 6. Respondent's attempt to downplay the Ninth Circuit's published holding, and thereby elude review, does not survive even a casual reading of the Ninth Circuit's opinion. The case represents a far-reaching new rule of the Ninth Circuit that instructs district courts to conduct their own comparison of stricken versus accepted jurors even when the state courts have forbidden it. This decision thus represents far more than a decision regarding sufficiency of the evidence -- the question is nothing less than whether *every* pending habeas petition in the Ninth Circuit raising a *Batson* claim (*Batson v. Kentucky*, 479 U.S. 79 (1986)), can now be subjected to the new rule of comparative analysis set forth in this published decision. Similarly, respondent misplaces emphasis on the fact that the Ninth Circuit's decision "does not raise any issue with respect to review of *state court* fact finding" (Opp.7), as though the fact that the underlying evidentiary hearing was held in a federal court eliminates any concerns about federalism, comity and finality. He prefers to characterize the case as only involving issues of fact-finding procedures in the federal courts. He misses the point that the federal court is here requiring a certain procedure, never endorsed by this Court, and will overturn a state conviction for failing to adhere to it. The Ninth Circuit is effectively ordering California to adopt this rule of procedure because otherwise future state cases will face the same fate as this case-if the state court fails to conduct comparative review there will eventually be a day of

reckoning in the Ninth Circuit. The Ninth Circuit's new rule of comparative review directly threatens interests of federalism, irrespective of whether the factual findings (ironically rejected by the Ninth Circuit panel) were made by a United States District Court judge rather than a state judge. In either circumstance the new rule remains. Stated another way, respondent is apparently claiming that this case could be limited to applying only in circumstances in which a federal court, rather than a state court, conducts the evidentiary hearing. But the opinion is obviously not confined to such a circumstance and will be invoked by habeas petitioners throughout the Ninth Circuit as the basis for granting a writ regardless of whether the state court has conducted a fact-finding inquiry. In short, Rule 10's restrictions on review have nothing to do with the issue of general importance presented in this case.

Respondent also argues that the Ninth Circuit's decision will not have any impact on state court decisions in *Batson* cases. In doing so he only further misconstrues the Ninth Circuit's holding when he contends that the opinion does not *compel* state courts to engage in a comparative analysis, but merely *suggests* that such analysis is a helpful -- but not constitutionally required -- "tool." Opp. 8. This is just a distortion of the opinion. Apparently respondent assumes that a decision only 'requires' a new rule if the opinion explicitly says that the new rule is 'required' or mandatory. In respondent's view, at least for the proposes of opposing certiorari, a federal district court within the Ninth Circuit is free to reject the published holding in this case on the grounds that nowhere in the opinion does the panel explicitly say that their new rule *must* be followed. In fact, however, a state court in California that continues to adhere to California's prohibition on comparative analysis now surely invites reversal by the Ninth Circuit under the authority of this case.

Respondent also says that state court rulings will not be affected by this case because the Ninth Circuit "did not hold that comparative analysis is constitutionally mandated." Opp. 8. That interpretation only misunderstands the nature of habeas review. Habeas relief is only available to a person whose custody violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 480, 116 L.Ed. 385 (1991). And the Ninth Circuit was only able to invent a Constitutional violation in this case by announcing and enforcing this new rule of comparative analysis. The Ninth Circuit is not free to overturn a state conviction of murder in the absence of a constitutionally mandated rule. If respondent *were* correct, and the Ninth Circuit has *not* held that comparative analysis is not required by the Constitution, then that court necessarily lacked a sufficient basis to grant habeas relief.

Respondent uses the same misimpression to skate over the obvious *Teague* implications (*Teague v. Lane*, 489 U.S. 288 (1989) of this case. As the state argued above, if the Ninth Circuit did *not* consider comparative analysis to be a constitutionally compelled rule, the rule has no business in this habeas case.

Finally, respondent argues that even though California law has been undermined on the subject of *Batson* hearings, there is no conflict between circuits as a result of this case. In response to the state's citation of *United States v. McMillon*, 14 F. 3d 948, 953-54 (4th Cir. 1994), respondent argues that the Fourth Circuit in *McMillon* has only left the issue of comparative analysis for another day. Opp. 11-12. But the state accurately described the legal landscape in the petition for a writ of certiorari. The Fourth Circuit has not approved comparative analysis and California has rejected it. The Ninth Circuit has become the first federal court to announce the new rule of comparative review, and has applied it in order to grant a writ. The Ninth Circuit's

opinion thus creates a conflict of constitutional law, certainly with respect to California and by implication with the Fourth Circuit, sufficient to justify relief from this Court. At a minimum, this case is appropriate for summary disposition.

It should be noted, in conclusion, that respondent's only attempt to acknowledge *Teague* consists of his misconception that this new rule of comparative review is somehow a voluntary, non-constitutional device. Aside from that, his opposition offers no defense of either the *Teague* violation or the circuit's chronic failure to enforce *Teague*. The Ninth Circuit panel similarly failed to respond to the state's *Teague* argument even after a request for rehearing on that basis. The silence is understandable. The *Teague* violation is apparent.

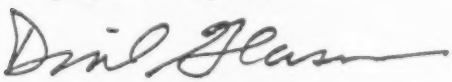
CONCLUSION

For the foregoing reasons, the petitioners request that a writ of certiorari issue in this case.

Dated: February 9, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
*DONALD E. DeNICOLA
Deputy Attorney General



DAVID F. GLASSMAN
Deputy Attorney General
*Counsel of Record

Counsel for Petitioners

DFG:gm
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